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In the Supreme Court of the United States

OCTOBER TERM, 1992

RAILROAD COMMISSION OF TEXAS, ET AL., PETITIONERS

v.

MISSOURI PACIFIC RAILROAD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

MAUREEN E. MAHONEY
Deputy Solicitor General

WILLIAM K. KELLEY
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

WALTER B. MCCORMICK, JR.
General Counsel

PAUL M. GEIER
Assistant General Counsel for Litigation

DALE C. ANDREWS
Deputy Assistant General Counsel for Litigation
Department of Transportation
Washington, D.C. 20590

QUESTION PRESENTED

Whether Texas Administrative Code tit. 16, § 5.619 (1988), which requires railroads to provide walkways adjacent to railroad tracks in certain circumstances, is preempted by regulations adopted by the Secretary of Transportation, pursuant to the Federal Railroad Safety Act of 1970, 45 U.S.C. 434.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Respondents, a group of railroad companies, brought this action against petitioners Railroad Commission of Texas and its Commissioners seeking declaratory and injunctive relief that certain safety regulations promulgated by the Commission are preempted by federal law.

1. The state regulation at issue in this case requires railroads to construct walkways alongside railroad tracks, in certain circumstances and in conformity with design specifications set by the Commission.[1] See Tex. Admin.

[1] The term "walkway" is defined by the Commission as "[a] pathway located alongside a railroad track or railroad switch for the purpose of providing an area for a railroad employee to perform

Code tit. 16, § 5.619 (1988). Walkways are required in the following circumstances:

> Walkways shall be located along both sides of all tracks within yards and tracks adjacent thereto so as to include all points contiguous to yards where railroad employees normally work on the ground. Walkways conforming to this standard shall be constructed and maintained throughout the area where mechanical inspections routinely occur.

Id. § 5.619(e). The regulations detail the locations where walkways are required (*id.* § 5.619(f)-(h)), and also prescribe the surface, slope, and width of the walkways (*id.* § 5.619(b)-(d)). The purpose of the regulations is to enhance occupational safety by providing more secure footing for railroad employees working alongside the tracks. Pet. 4. The question presented is whether these walkway regulations are preempted by federal law.

2. a. In 1970, Congress enacted the Federal Railroad Safety Act of 1970 (FRSA), 45 U.S.C. 421, 431 *et seq.*, to "promote safety in all areas of railroad operations and to reduce railroad-related accidents." 45 U.S.C. 421. To that end, FRSA gives the Secretary of Transportation authority to promulgate regulations relating to railroad safety. The Secretary has in turn delegated that authority to the Administrator of the Federal Railroad Administration (FRA). 49 C.F.R. 1.49(m).

FRSA also provides that regulations issued by the Secretary preempt any state requirement if the "subject matter" has been "cover[ed]" by the Secretary, unless the state requirement represents a supplemental (but not conflicting) response to an "essentially local safety hazard." 45 U.S.C. 434. This express preemption provision states in its entirety:

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duties associated with that track." Tex. Admin. Code tit. 16, § 5.619(a)(1) (1988).

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. 434.

b. Over the last two decades, the Secretary has exercised his delegated rulemaking authority to issue extensive safety regulations relating to railroad operations. The overall safety program adopted by FRA is set forth in Parts 200-240 of Title 49 of the Code of Federal Regulations.

Subpart B of Part 213 directly establishes the minimum safety requirements a railroad must satisfy "for roadbed and areas immediately adjacent to roadbed." 49 C.F.R. 213.31.[2] The regulations impose two principal requirements. First, a railroad must ensure that drainage facilities "under or immediately adjacent" to the roadbed be maintained so as "to accommodate expected water flow for the area concerned." 49 C.F.R. 213.33. Second, vegetation "on or immediately adjacent to roadbed must be controlled" to ensure that it does not, *inter alia*, "[i]nterfere with railroad employees performing normal trackside duties." 49 C.F.R. 213.37, 213.37(c).

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[2] The federal regulations therefore operate in the same area described in the Texas walkway regulations, *i.e.*, the area "along both sides of all tracks." Tex. Admin. Code tit. 16, § 5.619(e) (1988).

Subpart D, which governs the requirements for "track structure," also has a bearing on the structural characteristics of the roadbed. Those regulations require that track must be supported with ballast materials that:

> (a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;
> (b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails;
> (c) Provide adequate drainage for the track; and
> (d) Maintain proper track cross-level, surface, and alinement.

49 C.F.R. 213.103.

FRA has not adopted regulations requiring railroads to construct walkways adjacent to railroad tracks. The only express reference to walkways in FRA regulations is set forth in standards governing railroad bridges and trestles. Under 49 C.F.R. 214.103(c), FRA has specified certain design requirements governing walkways on bridges and trestles, if the railroads or their contractors decide to utilize walkways in lieu of personal fall arrest systems or safety nets. See "Final Rule: Bridge Worker Safety Rules," 57 Fed. Reg. 28,116, 28,128 (June 24, 1992) (to be codified 49 C.F.R. 214.103(c)).

3. a. In October 1986, the Chief Counsel of FRA advised the Commission by letter of FRA's view that Section 5.619 is "without force and effect," because it is preempted by federal law. See Letter from John M. Mason, FRA Chief Counsel, to the Texas Railroad Commission 1 (Oct. 17, 1986) (Mason Letter) (*reprinted*, App., *infra*, 1a-8a). In support of that conclusion, the letter cited the track safety and roadbed composition regulations, which he noted extended to areas immediately adjacent to the roadbed. Invoking FRSA's express preemption provision, 45 U.S.C. 434, the Chief Counsel stated (Mason Letter at 4; App., *infra*, 6a):

> although FRA has not issued a specific rule on walkway location and width, in my opinion FRA has acted so as to occupy the subject matter addressed by the Commission's rule, *i.e.*, trackside walkways, a matter subsumed by the larger subject of areas immediately adjacent to the roadbed.

b. FRA has addressed the subject of walkways and worker safety in other contexts as well. Although FRA's safety program does address concerns related to worker safety, in 1975 FRA considered adoption of a code of occupational standards directed at all railway employee activities. 40 Fed. Reg. 10,693 (1975). FRA later concluded that this rulemaking should be terminated. That decision was reflected in a 1978 Policy Statement in which FRA concluded that a comprehensive code of occupational regulations was unnecessary in light of regulations promulgated by the Occupational Safety and Health Administration (OSHA), covering a broad range of employee activity. At the same time, however, the agency expressed its determination that OSHA regulations concerning walking and working surfaces should not apply to "walkways beside the tracks in yards or along the right-of-way." 43 Fed. Reg. 10,587 (1978).

With respect to the specific question of walkways, the agency in 1977 considered, but declined to adopt, a proposed rule requiring railroads to construct walkways on bridges and trestles. FRA found that the benefits of the walkways rule would be outweighed by the costs. 42 Fed. Reg. 22,184, 22,185 (1977). The agency further concluded that States should instead address the "employee safety problem" by requiring walkways "in a particular area" or "on a particular structure" as "local" conditions require. *Id.* at 22,185.

4. Respondents brought the present action in federal district court seeking to enjoin the Commission's enforcement of Section 5.619. The complaint alleged that the regulation was preempted by FRSA and the agency's

implementing regulations.[3] Respondents ultimately prevailed on that preemption claim after two appeals.

a. The district court initially granted summary judgment for the railroads in 1987 based upon its conclusion that walkways were part of the roadbed, and the subject of roadbeds had been occupied by FRA regulations. See *Missouri Pacific R.R.* v. *Railroad Comm'n*, 653 F. Supp. 617, 624-626 (W.D. Tex. 1987). On appeal, the Fifth Circuit reversed and remanded for further proceedings. See *Missouri Pacific R.R.* v. *Railroad Comm'n*, 833 F.2d 570 (5th Cir. 1987) (*reprinted*, Pet. App. 40a-55a).

The court of appeals rejected the argument that FRA's failure to adopt a walkway requirement should itself be dispositive of the preemption inquiry. Pet. App. 48a-49a. The court determined that this regulatory omission should not be construed as an FRA policy decision that walkways should not be required. Instead, the court viewed FRA's actions in prior rulemaking proceedings concerning various walkway and worker safety issues as a decision to postpone consideration of the issue. *Id.* at 49a.

The court nevertheless concluded that preemption should be required if Section 5.619 had the practical effect of regulating the design and structure of the roadbed and track. Pet. App. 46a-47a. In the court of appeals' view, "if, from a practical standpoint, the * * * requirements of the state walkway regulation generally add to the FRA standards by requiring the railroad to strengthen or enlarge the roadbed beyond FRA requirements," *id.* at 47a, the federal regulations have covered the subject matter of the state rule and preemption is triggered. Because the Commission had submitted an affidavit disputing the railroads' claim that walkways

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[3] The complaint also challenged other regulations, and included other causes of action. The challenged regulations were upheld in part and invalidated in part. See Pet. App. 40a-55a. The only issue before this Court is whether Section 5.619 is preempted by FRSA.

would materially impact the roadbed structure, the court of appeals remanded the case for trial. *Id.* at 47a-48a.

b. After trial on remand, the district court concluded that Section 5.619 is preempted by FRSA. See Pet. App. 18a-37a. Both parties presented expert testimony concerning the factual relationship between compliance with the state and federal regulations. Based upon the testimony of the railroads' experts, which the district court found to be "more persuasive," *id.* at 31a, the court entered factual findings concerning the effects of compliance with the state requirement on the federal scheme.

First, the district court concluded that walkways are "an integral part" of the "roadbed and track structure." Pet. App. 33a. Second, the district court concluded that compliance with Section 5.619 would generally require railroads "to strengthen or enlarge the roadbed beyond the FRA requirements." Pet. App. 32a. Third, the court further found that compliance with Section 5.619 would directly interfere with the track safety standards adopted by FRA. The court based that conclusion on the fact that the state-mandated walkways would have to be constructed with "materials that would, because of continuous rail traffic and regular maintenance, have the effect of weakening the track structure, impair drainage, and in time, weaken the roadbed itself." Pet. App. 33a.[4]

The court of appeals affirmed, concluding that the district court's factual findings regarding the practical

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[4] In an alternative holding, the district court (Pet. App. 34a-36a) concluded that Section 5.619 does not come within FRSA's "local safety hazard" exception, see 45 U.S.C. 434. The court noted that rules applicable on a statewide basis cannot be addressed to local hazards, and, in any event, the state regulation is incompatible with federal rules because the walkways required by state law would "impede the drainage capability of the track structure." Pet. App. 36a. The court of appeals found it unnecessary to reach the local safety hazard issue because the Commission expressly disclaimed reliance on that exception to FRSA preemption. *Id.* at 13a.

effects of Section 5.619 on the operation of FRA regulations were not clearly erroneous. Pet. App. 1a-15a. Accordingly, the court permanently enjoined enforcement of Section 5.619.

DISCUSSION

In our view, the court of appeals correctly determined that petitioner's rule mandating walkways alongside railroad tracks is preempted. Further, we do not believe that it is necessary for the Court to grant plenary review of the issue at this time. Although the decision conflicts with a per curiam affirmance of the Ninth Circuit in *Southern Pacific Transportation* v. *Public Utilities Comm'n*, 820 F.2d 1111 (1987), that conflict may well be resolved by the circuits upon reconsideration of this issue in light of the decision in *CSX Transportation, Inc.* v. *Easterwood*, Nos. 91-790 & 91-1206 (argument scheduled for Jan. 12, 1993). The threshold issue here, as in *CSX*, is the proper standard for determining when a federal regulation should be found to "cover[] the subject matter" of a state requirement within the meaning of Section 434 of FRSA. We therefore believe that the petition in this case should be held pending the decision in *CSX*, and that the need to remand the case for further proceedings should be determined in light of that decision.

1. Under well-established principles governing preemption analysis, state law is preempted in any circumstance in which Congress expressly so provides. See, *e.g.*, *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983). Section 434 of FRSA, 45 U.S.C. 434, is such an express preemption provision. In order to ensure "to the extent practicable" national uniformity of rail safety regulation, Section 434 mandates that state laws relating to railroad safety—such as the regulation at issue in this case—are preempted if the Secretary of Transportation promulgates a rule, regulation, standard or order "covering the subject matter" of the state requirement. 45

U.S.C. 434. To the extent that the Secretary has covered a subject (and where Section 434's local hazard exception is not applicable) a State is expressly precluded from continuing to enforce its own requirements.[5] Rather, the Secretary's regulation is substituted as the governing rule.

In *CSX*, the United States filed a brief as amicus curiae setting forth our view of the proper analysis of pre-emption issues under FRSA. In our view, whether the Secretary has "cover[ed]" a subject matter should be determined by reference to several factors. First, "if the specific requirement imposed on the railroad by the State has also been addressed by the Secretary" directly through regulations, then the subject of the state requirement has been "covered." Brief for the United States as Amicus Curiae Supporting Affirmance at 15-16, *CSX Transportation, Inc.* v. *Easterwood*, Nos. 91-790 & 91-1206. Second, "if the Secretary has not addressed the specific state requirement, preemption should nevertheless be found if federal regulations deal broadly and substantially with—in effect, occupy the field of—the state law requirement at issue." *Id.* at 16. Third, the agency's interpretation of the "subject" covered by its safety regulation—and therefore its preemptive scope—should ordinarily be dispositive. *Ibid.*

2. Although federal regulations do not expressly address the need for walkways alongside railroad tracks to promote worker safety, the second and third factors set forth in our brief in *CSX*—the scope of the field regulated by FRA and the agency's intent—fully support the

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[5] Under the local hazard exception, States are permitted to continue to enforce a regulation "when necessary to eliminate or reduce an essentially local safety hazard," so long as the provision does not conflict with federal regulations and does not impose an undue burden on interstate commerce. 45 U.S.C. 434. We agree with the district court that Section 5.619 does not come within that exception because it is applicable throughout the State of Texas. Petitioners do not contend otherwise. See Pet. App. 13a.

court of appeals' conclusion that Section 5.619 is preempted. Regardless of the subject matter label the Commission may seek to attach to its regulation, it is apparent that Texas has sought to enhance railway employee safety by regulating the design of the roadbed adjacent to the track. That subject has been covered by FRA's regulations.

a. FRSA granted the Secretary broad authority to regulate "all areas of railroad safety." 45 U.S.C. 431(a). As the agency has developed its overall safety program, it has unquestionably taken into account the safety of railway employees. See, *e.g.*, 40 Fed. Reg. 20,693 (1975). One component of that overall safety program is the regulation of the roadbed and the adjoining area alongside the track. FRA has established the "minimum requirements" the railroad must meet to construct a safe "roadbed and areas immediately adjacent to roadbed." 49 C.F.R. 213.31. Those minimum safety standards do not mandate construction of walkways on top of or adjoining the roadbed. Section 5.619 seeks directly to supplement FRA's minimum safety requirements by mandating the construction of roadbeds equipped with walkways. Because FRA has already regulated comprehensively on the subject of the design standards for the construction of areas adjacent to the track, the state regulation is necessarily preempted.[6] See *Gade* v. *National Solid Waste Management Ass'n*, 112 S. Ct. 2374, 2385 (1992) ("To allow a State selectively to 'supplement' certain federal regulations with ostensibly nonconflicting standards would be inconsistent with [a]

[6] This conclusion holds true regardless of whether the agency actually considered the specific hazard the State sought to regulate, here the footing of railway employees working alongside the track. That is the very nature of field preemption. See, *e.g.*, *Napier* v. *Atlantic Coast Line R.R.*, 272 U.S. 605, 612-613 (1926). The agency's regulation of the subject must, however, be comprehensive enough to support the conclusion that the subject has been "covered", and that supplemental state regulation is thereby prohibited.

federal scheme of establishing uniform federal standards."); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 165 (1978) (where "federal scheme * * * aims precisely at the same ends as does [the state scheme]," state scheme cannot be defended on grounds that it establishes "different and higher design requirements").

Any claim that "walkways" and "roadbeds" are separate and independent "subjects" is directly refuted by the factual findings entered in this case. The district court found, and the court of appeals agreed, that compliance with Section 5.619 would require railroads to change the materials that make up roadbeds and to enlarge and strengthen existing roadbeds. See Pet. App. 8a-9a. The State has accordingly sought to regulate the problem of insecure footing alongside the track by regulating the construction of the roadbed—the very subject of FRA regulations. That it cannot do. See *Napier* v. *Atlantic Coast Line R.R.*, 272 U.S. 605, 612 (1926) (holding that a state law mandating an automatic firedoor on locomotives to protect firefighters was preempted by federal laws regulating locomotive design, even though the federal agency had not addressed this specific hazard, because the laws would "operate upon the same object" and were "directed to the same subject—the equipment of locomotives"). See also *Gade*, 112 S. Ct. at 2385 (efforts to regulate public safety through imposition of safety standards on workers impermissibly intruded into subjects regulated by OSHA). The problem posed by uncoordinated safety regulation by state and federal authorities in this area is underscored by the district court's further finding that construction of the walkways in the manner required by Texas law would in fact "weaken[]" the "track structure" and the "roadbed." Pet. App. 33a.

b. The agency has consistently interpreted its regulations as fully occupying the subject of roadbed structure, to the exclusion of the State's authority to adopt state-

wide walkway requirements. Under Section 434, Congress gave the Secretary authority to preempt all statewide regulation of railroad safety issues through adoption of standards and orders so that uniform, national regulation could be achieved "to the extent practicable." For this reason, it is both reasonable and logical to define the scope of the "subject" addressed by federal regulations through reference to the agency's intent.

i. FRA has repeatedly expressed the view that the issue of trackside walkways is encompassed by its regulations governing the subject of track and roadbed design, and that States have no authority to mandate construction of walkways in the absence of a local hazard. As set forth, FRA specifically advised the Commission in 1986 of the agency's view that Section 5.619 was "without force and effect" because trackside walkways are encompassed within the "subject of areas immediately adjacent to the roadbed." Mason Letter at 1, 4; App., *infra*, 1a, 6a. FRA has also advised other States that federal law prohibited imposition of statewide walkway requirements.[7]

ii. The agency's interpretation of the scope of the subject matter covered by its regulations is also grounded in the FRA Policy Statement issued in 1978. 43 Fed. Reg. 10,583 (1978). That policy was adopted in connection with the agency's decision not to issue a comprehensive code of occupational standards covering all aspects of railway employment. The Policy Statement explains that FRA has had "longstanding" involvement in "regulatory activities concerned with assuring * * * safe working conditions for railroad employees." *Id.* at 10,584. Although the agency determined that it should not venture into areas traditionally regulated by OSHA by adopting occupational standards governing issues common to railroad and non-railroad employees in "railroad yards, shops, and associated offices," *id.* at 10,587, it em-

[7] We have lodged copies of these letters with the Court.

phasized that it had in the past, and would in the future, reserve exclusive authority over occupational safety issues presented by core railroad operations on and alongside the tracks. *Id.* at 10,586, 10,587.

FRA explained that the "objective of protecting" all "railroad employees," as well as other persons "along the right-of-way" was "implicit" in its regulations, including those governing tracks and roadbeds. 43 Fed. Reg. 10,585 (1978). The Policy Statement underscored the agency's view that supplemental regulations by other governmental agencies in these areas would be counterproductive. It further explained that this view is based on the fact that "[p]rotection of the public generally and employees in particular is, of necessity, an integrated undertaking," because "it is not possible to regulate an individual hazard without impacting on other, related working conditions, nor without impacting on the safe transportation of persons and property." *Ibid.* The agency specifically stated that it considered hazards addressed by walkways beside the tracks to be within the area as to which the agency had occupied the field. *Id.* at 10,587.[8]

iii. It is also germane that FRA has consistently rejected proposals to adopt supplemental regulations requiring walkways on railroad bridges. In 1977, the agency concluded that such a rule was not only unwarranted,

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[8] In its first decision in this case, the court of appeals construed this section of the Policy Statement as a concession that the agency had not yet addressed the issue of walkways. Pet. App. 49a. To the contrary, the Statement reflects the agency's position that it had already regulated comprehensively in this area, and that it would supplement its regulatory scheme if and when it determined that there was a need for additional standards. See 43 Fed. Reg. 10,586 (1978) (stating that the agency had already "exercised its statutory authority" concerning the field of "[t]rack, roadbed and associated devices and structures" and that "[w]hile it is expected that additional regulatory initiatives may be undertaken, as necessary, * * * it is the judgment of the agency that piecemeal regulation of individual hazards * * * by any other agency of government would be disruptive and contrary to the public interest").

but might have a deleterious effect on safety. See 42 Fed. Reg. 22,185 (1977).[9]

Responding to a congressional directive to consider safety issues pertaining to workers on railroad bridges, see Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, § 19, 102 Stat. 637 (codified as 45 U.S.C. 431(n)), FRA recently revisited the issue. Again, however, the agency concluded that a walkway requirement would be inappropriate. "Federal Railroad Administration, Notice of Proposed Rulemaking: Bridge Worker Safety Rules," 56 Fed. Reg. 3434 (1991). In concluding that walkways should not be required, FRA stated:

> [T]he high cost of complying with a federal walkway requirement could divert funds otherwise intended for ongoing maintenance and improvement programs. The net result could actually decrease overall safety to railroad employees and members of the public.
>
> Based on these findings, FRA determined [in 1977] that a federal walkway requirement was not warranted, and in fact, may be deleterious to railroad employee[s'] safety.

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[9] FRA noted that:

> [T]he issuance of a Federal rule requiring walkways on railroad bridges, trestles, and similar structures cannot be justified at the present time. First, any such rule would impose significant added burdens in terms of the large dollar cost to the railroad industry for construction of the walkways, the added hazard to persons and property and additional liability exposure for the railroads because of increased trespassing, and the possible decrease in overall railroad safety because of the diversion of resources from other maintenance and improvement projects. Secondly, neither the commenters nor the FRA has been able to demonstrate that such a rule would result in a definite or measurable improvement to railroad employee safety. Finally, if an employee safety problem does exist because of the lack of walkways in a particular area or on a particular structure, regulation by a State agency that is in a better position to assess the local need is the more appropriate response.

42 Fed. Reg. 22,185 (1977).

Id. at 3438. In the final rule, FRA concluded that railroads should have the option of using walkways in lieu of personal fall arrest systems or worker safety nets. See "Federal Railroad Administration, Final Rule: Bridge Worker Safety Rules," 57 Fed. Reg. 28,116 (1992) (promulgating rule, to be codified at 49 C.F.R. 214.103(c), prescribing standards for walkways in such circumstances).[10]

iv. In summary, FRA has consistently expressed the view that its regulations cover the subject addressed by state-imposed walkway requirements and that such state requirements are preempted by Section 434 of FRSA. Not only is that conclusion required by a proper analysis of the scope of preemption under FRSA, as a practical matter it does not create any regulatory lapse. Under 45 U.S.C. 432, the Secretary has authority to issue emergency orders to remedy unsafe conditions. As the district court noted, FRA has persuaded railroads in Texas to remedy unsafe walkway conditions in Texas, on at least

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[10] FRA has accordingly decided, based upon its expert weighing of relevant safety considerations, not to impose a walkway requirement—on railroad bridges or elsewhere. That decision would, in and of itself, provide an independent basis for preemption, even if the Court were to find that the roadbed regulations had not already covered this subject through occupation of the field. See *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978) ("where failure of * * * federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute, States are not permitted to use their police power to enact such regulation.") (internal quotation mark omitted). See also, *Missouri Pacific R.R.* v. *Railroad Comm'n*, 850 F.2d 264 (5th Cir. 1988) (concluding that FRA's decision not to prescribe regulations concerning the use of cabooses (see 51 Fed. Reg. 17,300-17,301 (1986)) was preemptive under Section 434 of FRSA); *Norfolk & Western R.R.* v. *Public Utilities Comm'n*, 926 F.2d 567, 571-572 (6th Cir. 1991) (holding that FRA's decision not to promulgate regulations requiring walkways on railroad bridges was preemptive of state efforts to impose such rules because FRA's "deliberate refusal to require walkways * * * negatively preempted [the state rule] because the FRA ha[d] 'covered' the subject matter."). But see Pet. App. 48a-49a.

two occasions without having to issue emergency orders. See Pet. App. 33a. There is accordingly no reason to believe that the agency's interpretation of the subject matter covered by its regulations does not conform to congressional intent.

3. The holding of the Fifth Circuit in this case conflicts with the only other circuit court decision addressing the question whether state regulations relating to general trackside walkways are preempted by Section 434.[11] In *Southern Pacific Transportation* v. *Public Utilities Comm'n*, 820 F.2d 1111 (1987) (*reprinted* Pet. App. 70a-71a), the Ninth Circuit held that state walkway regulations were not preempted under FRSA because the Secretary had not adopted regulations covering that subject matter. The conflict between the Fifth and Ninth Circuits does not, however, presently warrant this Court's review.[12]

The Ninth Circuit's decision in *Southern Pacific* was a per curiam affirmance of the district court's analysis in *Southern Pacific Transportation* v. *Public Utilities Comm'n*, 647 F. Supp. 1220 (N.D. Cal. 1986) (*reprinted*, Pet. App. 56a-69a). The district court in that case concluded that

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[11] The Sixth Circuit's decision in *Norfolk & Western R.R.* v. *Public Utilities Commission*, *supra*, concerns a related, but distinct issue—the validity of state laws mandating walkways along railroad bridges. With respect to that precise issue, it is plain that FRA has specifically determined that bridge walkways are inappropriate. See 57 Fed. Reg. 28,116 (1992).

[12] A number of district and state courts have also had occasion to address whether Section 434 preempts state regulations relating to walkways adjacent to railroad tracks. See, *e.g.*, *Norfolk & Western R.R.* v. *Burns*, 587 F. Supp. 161 (E.D. Mich. 1984) (FRSA preempted Michigan Occupational Safety and Health Act regulation of tracks, roadbeds and walkways in rail yards); *Black* v. *Seaboard System R.R.*, 487 N.E.2d 468 (Ind. Ct. App. 1986) (FRSA preempted Indiana Public Service Commission rules relating to the condition of walkways along roadbeds); *Illinois Central Gulf Ry.* v. *Tennessee Public Services Comm'n*, 736 S.W.2d 112 (Tenn. Ct. App. 1987) (state walkway regulations not preempted by FRSA). See also Pet. App. 45a n.11 (gathering cases).

"[s]tate and federal regulations * * * cannot be held to cover the same subject matter unless they address the same safety concerns." Pet. App. 63a. Applying that analysis, the court held that state walkway regulations were directed at a different safety objective than FRA roadbed regulations, and were therefore not preempted. *Ibid.*

The *Southern Pacific* analysis is flawed. In our view, it cannot be squared with this Court's recent rejection of "the aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state * * * in passing its law had some purpose in mind other than one of frustration." *Gade*, 112 S. Ct. at 2387 (quoting *Perez* v. *Campbell*, 402 U.S. 637, 651-652 (1971)). See also *Florida Lime & Avocado Growers* v. *Paul*, 373 U.S. 132, 142 (1963). The better view, as we have expressed, is that Section 434 preemption depends on the scope of the Secretary's regulations and the Secretary's view of what subject those regulations cover.

In any event, it is unclear that the Ninth Circuit would adhere to its cursory per curiam affirmance in *Southern Pacific*. First, that court did not have the benefit of the Fifth Circuit's searching legal analysis in this case, or the district court's factual findings concerning the relationship between state walkway and federal roadbed regulations. Moreover, it is likely that this Court's analysis in *CSX* will effectively require the Ninth Circuit (as well as other courts of appeals) to reconsider prior precedents construing the preemptive scope of Section 434. It accordingly does not appear to be necessary to grant plenary review in this case in order to resolve the conflict between the Fifth and Ninth Circuits.

CONCLUSION

The petition should be held and disposed of as appropriate in light of the decision in *CSX Transportation, Inc.* v. *Easterwood*, Nos. 91-790 & 91-1206.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

WALTER B. MCCORMICK, JR.
General Counsel

MAUREEN E. MAHONEY
Deputy Solicitor General

PAUL M. GEIER
Assistant General Counsel for Litigation

WILLIAM K. KELLEY
Assistant to the Solicitor General

DALE C. ANDREWS
Deputy Assistant General Counsel for Litigation
Department of Transportation

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APPENDIX

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION

400 Seventh St., S.W.
Washington, D.C. 20590

Oct. 17, 1986

Mr. James E. Nugent, Commissioner
Mr. Mack Wallace, Commissioner
Mr. Clark Jobe, Commissioner
Railroad Commission of Texas
P.O. Drawer 12967
Austin, Texas 78711

Dear Sirs:

I understand that the Railroad Commission of Texas has recently adopted several safety rules affecting the operations of railroads operating within the State of Texas, and that these rules are now the subject of litigation in the United States District Court for the Western District of Texas. On behalf of the Federal Railroad Administration, I have previously stated my opinion as FRA Chief Counsel on the subject of state regulation of railroad walkways. Accordingly, I believe it may be helpful to furnish you and the court with those views as they relate to the walkway requirement stated in section 5.619 of the Texas Administrative Code. I have had an opportunity to study your examiner's memorandum and recommendation as well as the comments filed by the Texas Class I Railroads.

For the reasons stated below, it is my opinion as Chief Counsel that the rule adopted as section 5.619 has been preempted and is thus without force and effect.

The Federal Railroad Safety Act of 1970 (Safety Act) provides in part: "The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be national uniform to the extent practicable." 45 U.S.C. § 434. Courts have consistently acknowledged Congress' intent to establish national uniform control of railroad safety and to preempt regulation in this field. *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir. 1973), *cert. denied*, 414 U.S. 855 (1973); *Chicago Transit Auth. v. Flohr*, 570 F.2d 1305 (7th Cir. 1977); *Southern Pacific Transp. Co. v. United States*, 462 F. Supp. 1193 (E.D. Ca. 1978); *Atchison, Topeka and Santa Fe Ry. Co. v. Illinois Commerce Comm.*, 453 F. Supp. 920 (N.D. Ill. 1977). In fact, some courts have characterized the Safety Act as evincing a "total preemptive" intent. *National Association of Regulatory Commissioners v. Coleman*, 542 F.2d 11, 13 (3d Cir. 1976); *Santa Fe*, 453 F. Supp. at 925.

In *Santa Fe*, the court warned against interpreting the Safety Act in a way that would frustrate its stated purpose of establishing uniform standards. The court found that the legislative history of the Act clearly articulates this purpose:

> [The railroad industry] has a truly interstate character calling for a uniform body of regulation and enforcement. . . . To subject a carrier to a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

Id at 925, quoting House Report, 1970 U.S. Code Cong. & Admin. News, 91st Cong., 2d Sess. pp. 4104, 4110-11.

Consistent with the statutory mandate, FRA has previously expressed the agency's views on the scope of its regulatory purview:

> The overall FRA program to assure the safety of railroad operations may be generally subdivided into three fields: (1) Track, roadbed, and associated devices and structures, (2) equipment, (3) human factors. FRA has now exercised its statutory authority with respect to each of these regulatory fields by actual rulemaking. While it is expected that additional regulatory initiatives may be undertaken, as necessary, in each of the major regulatory fields, it is the judgment of the agency that piecemeal regulation of individual hazards in any of the three regulatory fields by any other agency of government would be disruptive and contrary to the public interest.

Policy Statement and Termination of Rulemaking on Railroad Occupational Safety and Health Standards, 43 Fed. Reg. 10,583, 10,586 (1978).

However, in the recognition that some state regulation of rail safety may be necessary, the Safety Act sets out a framework for determining when State requirements are preempted:

> A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard *covering the subject matter* of such State requirement. A State may adopt or continue in force an *additional or more stringent* law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an *essentially local safety hazard*, and *when not incompatible* with any Federal law, rule, regulation, order, or standard, and *when not creating an undue burden* on interstate commerce.

45 U.S.C. § 434 (emphasis added).

This framework establishes two levels of inquiry. First, upon identification of the "subject matter" of the chal-

lenged state rule, the question is whether FRA has taken affirmative or negative action "covering" that "subject matter," *i.e.*, has FRA occupied it in whole or in part either (i) by rule, regulation, etc., or (ii) by an agency decision, such as a policy statement or termination of a proposed rulemaking proceeding, that for a particular subject matter no rule or restriction is appropriate or necessary as a matter of rail safety (or a combination of affirmative and negative actions addressing a given subject matter). *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1977); *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926). If not, there is no further inquiry, and the State rule stands "until such time" as FRA does so act to "cover[] the subject matter".

If so, however, the inquiry passes to the second level: the state rule (by hypothesis "an additional or more stringent" one) is enforceable *only if* it satisfies a three-prong test: (i) necessary to eliminate or reduce an essentially local safety hazard; (ii) not incompatible with any Federal rule; and (iii) not an undue burden on interstate commerce. The legislative history of section 434 makes clear that the first prong does not contemplate statewide laws or rules; a "local safety hazard" is to be read as one peculiar to a particular locality. H.R. Rep. 1194, 91st Cong., 2d Sess. (1970).

In reality, the outcome under section 434 will be determined largely by whether the FRA rule has "cover[ed] the subject matter" of the state rule, for if it has the three-prong test establishes a very exacting standard for the State rule to satisfy. Indeed, while the statute contemplates some State regulation, the courts have construed the section 434 framework narrowly, giving broad support to the Safety Act's mandate for national uniformity. *National Association of Regulatory Commissioners*, 542 F.2d at 14; *Donelon*, 474 F.2d at 1112; *Santa Fe*, 453 F. Supp. at 926. These holdings are consistent with the court's commonly narrow construction of such saving

clauses in order to give full expression to the Congressional purpose. *Cippollone v. Liggett Group, Inc.*, 593 F. Supp. 1146 (D. N. J. 1984), citing *People of the State of Illinois v. City of Milwaukee*, 731 F. 2d 403, 413-14 (7th Cir. 1984), *American Progressive Life and Health Insurance Co. of New York v. Corcoran*, 715 F.2d 784, 786-87, (2d Cir. 1983); *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1084 (9th Cir. 1979); *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1274-81 (5th Cir. 1978).

As I understand it, section 5.619 prescribes, with certain exceptions, a uniform statewide standard of six-foot minimum continuous walkways along both sides of tracks in yards and places where switching is performed.

FRA has several rules covering this subject matter. FRA has adopted general regulations (49 C.F.R. Part 214) that prescribe minimum safety requirements for railroad track subject to Federal jurisdiction, which have been held to preempt the entire field of track safety standards. *Santa Fe*, 453 F. Supp. at 925. The FRA track standards also prescribe minimum requirements for areas "immediately adjacent" to the roadbed. 49 C.F.R. Part 213, Subpart B. This provision requires the control of vegetation adjacent to roadbed that might interfere with employees performing normal trackside duties. 49 C.F.R. § 213.37. Moreover, FRA requires the correction of defective walkways on signal structures under the authority of the Signal Inspection Act. 49 U.S.C. § 26(e).

In addition to these rules, FRA has expressed its policy that other government entities are precluded from exercising jurisdiction with respect to areas such as walkways beside the tracks in yards or along the right-of-way:

> These are areas which are so much a part of the operating environment that they must be regulated by the agency with the primary responsibility for railroad safety. Therefore, FRA will determine the need for and feasibility of general standards to

> address individual hazards relating to such surfaces, keeping in mind the requirement of proper clearances and the familiarity of employees with existing industry designs.

Policy Statement of Termination of Rulemaking on Railroad Occupational Safety and Health Standards, 43 Fed. Reg. 10,583, 10587 (1978).

FRA has also expressed its intent to use its Safety Act emergency power, in addition to its authority under the Signal Inspection Act and the Track Safety Standards, to achieve the correction of walkway-related problems. *Id.*

Thus, although FRA has not issued a specific rule on walkway location and width, in my opinion FRA has acted so as to occupy the subject matter addressed by the Commission's rule, *i.e.*, trackside walkways, a matter subsumed by the larger subject of areas immediately adjacent to the roadbed.

Our view of FRA's preemption of this area has been confirmed in court. In *Norfolk and Western Ry. Co. v. Burns*, 587 F. Supp. 161 (E.D. Mich. 1984), the court cited and relied on FRA's 1978 policy statement, quoted above, to find preemption under section 434. Given the relationship of the walkways to the railbed and the general construction of the roadbed and the rail system itself, the court reasoned that walkways are a part of the track structure and rail system and that regulation of them is accordingly preempted by FRA. The court, of course, recognized the State's ability to address local safety hazards. *Id.* at 170. A rule applicable on a statewide basis does *not* address a *local* safety hazard. *See also, Black v. Public Service Comm. of Indiana*, 487 N.E. 2d 468 (Ind. Ct. App. 1988).

Moreover, FRA has previously considered a walkway rule. On November 15, 1976, FRA published an advance notice of proposed rulemaking, stating that it was studying the need for a Federal regulation requiring the con-

struction of walkways on railroad bridges, trestles, and similar structures. (As I understand it, section 5.619 regulates walkways on a statewide basis, but does not apply generally outside yards). On April 26, 1977, FRA terminated this proceeding because it had concluded that the significant cost of constructing such walkways could not be justified by any definite or measureable improvement to railroad employee safety. FRA also found that such walkways could present added hazards because of increased trespassing, and that requiring their installation could cause overall railroad safety to decrease because it would divert resources from other more beneficial maintenance and improvement projects. FRA found that if an employee safety problem does exist because of lack of walkways in a particular area or on a particular structure, regulation by a state agency addressing a hazard peculiar to a given locality is the "more appropriate response." 42 Fed. Reg. 22,184 (1977). FRA's consideration of walkways in that proceeding, together with its regulation of trackside areas, demonstrates conclusively that FRA has addressed the subject matter and occupied it.

Accordingly, section 5.619 is preempted by FRA's actions in this area unless the State can satisfy the three-prong test of section 434. In this case, however, I believe it would be most difficult for the State to meet its burden of proof under that test. Even if the State could establish that section 5.619 was compatible with Federal regulations and not a burden on interstate commerce, I doubt that the State could show that this order was "*necessary* to eliminate or reduce an *essentially local* safety hazard," *i.e.*, one limited to a particular structure. To the contrary, section 5.619 by its own terms applies statewide. *See National Association of Regulatory Utility Commissioners*, 542 F.2d at 14-15; *Santa Fe*, 453 F. Supp. at 926.

In conclusion, it is my opinion as Chief Counsel that section 5.619 has been preempted, since the subject matter

has been addressed by FRA and the broad nature of the order does not comport with the Safety Act criteria for additional State requirements.

Very truly yours,

/s/ John M. Mason

JOHN M. MASON
Chief Counsel

cc: United States District Court for the Western District of Texas (Austin Division), No. A-86-CA-406

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